

Protest of) Date: December 19, 1989
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HANDLING SYSTEMS, INC.)
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Solicitation No. 039986-89-A-0037) P.S. Protest No. 89-70

DECISION

Handling Systems, Inc. timely protests the award of a contract under Solicitation No. 039986-89-A-0037 to North American Conveyor, Inc. (North American).

Solicitation No. 039986-89-A-0037 was issued by the Phoenix Facilities Service Office (FSO) on June 19, 1989, for the provision of a conveyor-system addition at the Rio Salado Facility in Phoenix, AZ. Section M.2 of the solicitation, Contract Award and Proposal Evaluation, indicated that award would be made to the offeror submitting the best proposal evaluated in accordance with the solicitation's evaluation scheme. That scheme set out two evaluation factors (experience on projects of similar type and size and references for previous work) and noted that "cost/price will be considered in the award decision, although the award may not necessarily be made to that offeror submitting the lowest price."

Of the timely proposals reviewed by the contracting officer, Handling Systems' proposal offered the lowest price. However, its proposal contained a number of terms that the contracting officer regarded as qualifying the offer. For example, the proposal provided limitations on the circumstances of installation which were at variance from the terms of the solicitation, such as requirements that Postal Service personnel unload equipment delivered to the installation site and perform portions of the clean-up work. In addition, Handling System's proposed price was more than 35 percent below the low end of the range representing the Postal Service estimate.

The contract specialist assigned to the solicitation contacted Handling Systems, advised it that its proposal was "unacceptable as it was presented" and requested a cost breakdown of the proposal. The protester responded with an attempt to revise its proposal orally including a price increase of more than 10 percent. On July 24, Handling Systems submitted a one-page letter that contained a four-category breakdown of its new price and indicated that it was confirming its "revised bid to conform completely with the Bid Specifications." The letter also noted that Handling Systems' "original proposal had certain exceptions that are not part of this revision."

On July 26, 1989, the contracting officer advised North American of his intent to award the contract to that firm upon receipt of acceptable payment and performance bonds.^{1/} By letter to Handling Systems dated August 4, the contracting officer advised it that he regarded its proposal as "nonresponsive," in view of the "qualifying constraints" that it contained. A contract was awarded to North American on August 16.^{1/} However, the contracting officer has indicated that a notice to proceed has not been issued to North American.

Handling Systems advances four arguments in support of its protest. First, it argues that it is entitled to award as the low bidder on the project. Second and third, it argues that its first proposal met the solicitation's requirements "functionally and specification-wise," and that its revised proposal of July 24 met or exceeded all requirements. Finally, Handling Systems asserts that what the contracting officer described as qualifying constraints in its initial proposal were, in fact, clarifications of items in the solicitation.

The contracting officer agrees that Handling Systems' offer was low, but disagrees with the protester on its other three arguments. First, he points out that Handling Systems never responded to the Postal Service's request for clarification by submitting the breakdown requested. He also suggests that the revision's substantial increase in price indicates that the original proposal did not meet the specifications. As to the assertion that the qualifications stated in Handling Systems' proposal were necessary clarifications of the specifications, he points out that other firms responding to the solicitation had no such difficulty, and that no questions on these items had been raised at the pre-proposal conference.

Discussion

Our analysis of the protest is complicated by both the protester's and the contracting officer's use of terms related to formally advertised procurement procedures, rather than to the negotiated process that was used here under the Procurement Manual. For example, although there are repeated references to the protester as a "bidder," Handling Systems was actually an offeror. Similarly, the contracting officer contends that Handling Systems' offer was not "responsive;" in the context of a negotiated procurement, an offer may be technically deficient, but is not to be rejected as "nonresponsive." CFI, P.S. Protest No. 88-82, February 17, 1989. "The 'responsiveness' of a proposal made pursuant to a request for negotiation proposals is not critical to its consideration." Sea-Land Service, Inc., P.S. Protest No. 80-18, June 30, 1980.

Although there is confusion over applicable terminology, it appears that the contracting officer thought that he was awarding a contract without discussions on the basis of

^{1/}PM 11.5.1 p.1 provides for the issuance of a notice of award in this manner.

^{2/} The basis for the contracting officer's decision to proceed in this sequence is not clear. PM 11.5 i calls for notification to unsuccessful offerors "promptly after award," yet the notification to Handling Systems was made more than a week before the date identified by the contracting officer as the date of award.

initial proposals.^{1/} However, the contracting officer did not proceed in that manner. Instead, he sought an explanation of Handling System's proposal, which contained a number of statements inconsistent with the requirements of the solicitation and which offered a price far below the Postal Service's estimate and those of other proposals. The protester replied by submitting a revised proposal with a higher price. The contracting officer never responded to the protester's revised proposal and continued to refer to the "nonresponsiveness" of Handling Systems' proposal and the unreasonable lowness of Handling Systems' initial proposed price.

In so dealing with Handling Systems' proposal, the contracting officer committed several errors. First, by requesting a revised proposal from Handling Systems, he entered into discussions with them.^{4/} Having entered into discussions with Handling Systems, the contracting officer was obligated to hold discussions with all offerors in the competitive range, PM 4.1.5 g.1, and to issue a request for best and final offers upon completion of discussions. PM 4.1.5 g.4. In addition, negotiations were inadequately conducted pursuant to PM 4.1.5 g.3 because they failed to resolve the suspected mistakes by calling them to the offeror's attention as specifically as possible or provide the offeror a reasonable opportunity to submit revisions to its proposal. See Dwight Foote, Inc., P.S. Protest No. 87-90, September 28, 1987. Therefore, the discussions conducted by the contracting officer were flawed.

Second, the contracting officer's rejection of Handling Systems' proposal as technically unacceptable was incorrect. Our office will not substitute our judgment for that of the technical evaluators, and will not disturb the evaluation unless it is shown to be "arbitrary or in violation of procurement regulations." Lazerdata Corporation, P.S. Protest No. 89-60, September 29, 1989; Amdahl Corporation, P.S. Protest No. 81-34, November 23, 1981. However, a proposal cannot be eliminated from the competitive range if it can be improved reasonably to the point where it would become the most advantageous offer; alternatively, a proposal must be considered to be within the competitive range unless it is so technically inferior or out of line as to price that meaningful negotiations are precluded. Emerson Electric Company, P.S. Protest No. 75-37, June 29, 1975.

The contracting officer received a revised proposal from Handling Systems which put its price much more in line with the other offerors and the Postal Service estimate, and indicated, at least indirectly, that it would comply with all the requirements of the

^{3/}The solicitation contained Provision A-9, Award Without Discussions, at Section K.1 which allowed for the possibility of award without discussions, although it did not indicate whether the contracting officer intended to do so.

^{4/}Uncertainties in the most favorable initial proposal can be resolved without discussions if the uncertainty is insignificant enough to be able to be resolved by a request for clarification. PM 4.1.5 f.2. However, clarification is defined as a "communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in a proposal." PM 4.1.5 a.2. Given the significance of the uncertainties as to both price and technical proposals, we must find that the contracting officer's request for a revised proposal was a discussion as defined at PM 4.1.5 a.3.

solicitation. By rejecting its offer without establishing that the proposal was clearly outside the competitive range and failing to engage in further discussions to determine the acceptability of Handling Systems' proposal,¹⁷ the contracting officer's rejection of its proposal was arbitrary and in violation of applicable regulations. See PM 4.1.5 g.2.

Finally, the proposals were not evaluated in accordance with the evaluation factors set forth at section M.2 of the solicitation. It is axiomatic that once offerors are informed of evaluation criteria, the procuring agency must adhere to those criteria or inform all offerors of any changes made in the evaluation scheme. POVECO, Inc., P.S. Protest No. 85-9, May 21, 1985. In the technical evaluation of proposals, there must be a documented determination of whether each proposal meets the solicitation's requirements, and an analysis of technically acceptable and unacceptable proposals. PM 4.1.4. In the instant procurement, the evaluation provision (Section M.2) indicated that award would be made to the responsible offeror with the best combination of technical proposal, business proposal and business/management proposal (if applicable); beyond price and subcontracting factors, it indicated that experience and references would be of primary importance in determining which proposal was most advantageous to the Postal Service.

The protest file indicates that proposals were evaluated through the preparation of an abstract of offerors and prices.¹⁸ However, there is no documented evaluation of the protester's revised proposal that identifies technical deficiencies or indicates whether such deficiencies could be remedied (and the proposal made acceptable) through discussions.¹⁹ Because the proposals were not evaluated in accordance with the evaluation criteria set forth in the solicitation, the evaluation is flawed.

Given the errors we have identified above, Handling Systems' protest must be sustained.

As noted above, a contract was awarded to North American after the contracting officer had received Handling System's protest.²⁰ The remedy for the procurement improprieties found here should include the termination for convenience of the contract awarded to North American, and the proper evaluation of Handling Systems' proposal,

^{5/}We note in this regard that "the contract requirements in a negotiated procurement are not mandatory." Sea-Land Service, Inc., On Reconsideration, P.S. Protest No. 80-18, August 6, 1980.

^{6/} A notation referring to the qualification of Handling Systems' proposal is made on a copy of this abstract and reads "Handling Systems qualified their \$45,480 proposal and therefore was non responsive & 47% under est."

^{7/} Some of the offerors, including North American, did not include any information in their proposals how they would respond to the detailed specification for the work to be performed.

^{8/}There is no indication that the decision to award pending the resolution of the protest was supported by the determination of serious injury required by PM4.5.5 a. The contracting officer indicates that Handling System's protest was determined to be of no merit, but that conclusion is inconsistent with the referral of the protest to this office. See PM 4.5.6 c.

as revised, and the other proposals received, in accordance with the evaluation scheme set out in the solicitation.^{1/} Since the correspondence with Handling Systems and its reply constitute discussions, discussions should be held with the other offerors.

See PM 4.1.5 g. Should the passage of time have occasioned any changes in the Postal Service's requirements, those changes should be reflected in the solicitation by amendment, another circumstance requiring that offerors be allowed to revise their proposals.

The protest is sustained.

William J. Jones
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Office of Contracts and Property Law

[checked against original JLS 5/25/93]

^{9/} The record indicates that the contracting officer did not evaluate a late-received proposal. In his further actions, the contracting officer should exclude that proposal from consideration only if he makes a further determination that such exclusion is in the best interest of the Postal Service, in accordance with PM 4.1.3 d.2.